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IN THE

Supreme Court of the United States

October Term, 1965

No. 589

SHAPIRO & SON CURTAIN CORP.,

Petitioner,

AGAINST

BASIL GLASS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

SHAPIRO & SON CURTAIN CORP.,
Petitioner,
No. 222 Fifth Avenue,
New York, New York.

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OCTOBER TERM, 1965

No. .....

SHAPIRO & SON CURTAIN CORP.,

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BASIL GLASS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners herein hereby apply to this court for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit in connection with the grant by that court of an order which quashed the service of process upon the respondent herein.

Jurisdiction

This court has jurisdiction granting the relief sought herein pursuant to 28 U. S. C. §1254(1). The decision of the Court of Appeals was made on July 8, 1965. This petition is filed within three (3) months of the determination as required.

Citation of Opinion Below

See Appendix.

Facts Involved

The respondent herein, Basil Glass, is the controlling stockholder and director of a British corporation known as Everwear Candlewick, Limited. This corporation is alleged by the petitioner to be financially irresponsible and has no assets in the United States of America. The Board of Directors of Everwear Candlewick, Limited includes the respondent Glass; another is his brother Julius, and there is a third member not related to either of them. It follows that Julius Glass and Basil Glass control the Board of Directors of Everwear Candlewick, Limited which brought an action in the District Court of the United States for the Southern District of New York against the petitioner in this action.

In the action brought against the petitioner herein by the defendant the claim was made that an agreement with Everwear Candlewick, Limited was breached by the petitioner. The petitioner in its answer in that action denied any breach and further alleged that the agreement was materially altered by the respondent subsequent to its execution. The petitioner also interposed a counterclaim to the effect that said Everwear Candlewick, Limited violated the anti-trust laws of the United States, interfered with the business relationships of the petitioner, brought a malicious and unwarranted suit upon a materially altered document, made wrongful claims which damaged the commercial standing of the petitioner and unlawfully obtained confidential business information, all of which were alleged to be performed at the behest and connivance of the respondent Basil Glass. Basil Glass is a citizen of

Great Britain and is believed to have no assets in the United States.

The respondent Glass was also examined before trial and it was during the course of this examination that he was served with a summons and complaint in an action (now before the court) in which the service of the summons was quashed. The opinion of the District Court as well as the Circuit Court of Appeals for the Second Circuit held that the service of the summons was improper upon the theory that the respondent was entitled to immunity as a witness in the case.

It is the contention of the petitioner that the Court of Appeals for the Second Circuit failed to follow a controlling decision of the United States Supreme Court entitled *Lamb* v. *Schmitt*, 285 U. S. 222, that the Court of Appeals made a determination directly at variance with other determinations within the Second Circuit, and that the Court of Appeals made a determination directly in conflict with the Tenth Circuit case of *Calada* v. *Walker*, 309 Fed. (2nd) 74. It is the petitioner's further contention that the determination of the Second Circuit Court of Appeals deprived the petitioner of his rights without due process of law in violation of the Fifth Amendment to the Constitution of the United States. The constitutional point was also duly raised before the Court of Appeals.

POINT I

The determination of the Court of Appeals was directly contrary to the determination of the Supreme Court of the United States in *Lamb* v. *Schmitt*, 285 U. S. 222.

In the case at bar the respondent Basil Glass, dominating and controlling an alien corporation, brought a suit against the petitioner in the United States District Court for the Southern District of New York. Obviously, by bringing this suit, the corporate plaintiff is subject to jurisdiction under well recognized rules of law which need not be cited here. However, as also appears from the record, the alien corporation is financially irresponsible but the party who brought the action, Glass, is presumably financially responsible and has assets sufficient to meet any personal judgment which may be rendered against him by reason of the counterclaim involved. As held in repeated decisions of the courts the use of a corporate form will not insulate an individual from a tort committed by him as an officer of a corporation.

If Glass were, in fact, a citizen of the United States he would clearly be subject to jurisdiction on the counterclaim involved. If the determination of the Court of Appeals for the Second Circuit were upheld then, in effect, an alien would be given greater rights than a citizen since an alien could organize a financially irresponsible alien corporation, commence a suit in this country in the name of the alien corporation, and be insulated against personal suit in this country for any tort committed by reason of such acts. Thus, if the position of the Court of Appeals was sustained, the immunity would be used to protract the pending litigation and make it more difficult to be carried to a conclusion directly contrary to the position taken by this court in *Lamb* v. *Schmitt, supra.*

This court had a situation, involving considerably weaker facts than that set forth in the case at bar, in the above-cited case. In that case the court held as follows:

> "* * * The question presented here is of a somewhat different character: Whether, despite any effect of the immunity in encouraging voluntary attendance at the trial, it should be withheld for one who, while in attendance, is served with process commanding his continued presence and to facilitate the pending litigation, and to carry it to its final conclusion. * * *
>
> These considerations have in special circumstances led to a denial of the immunity, even though the service was made in a different suit in no sense ancillary to the pending litigation. * * *"

If the determination of the Court of Appeals of the Second Circuit were sustained then a rule of law would be promulgated to the effect that any person coming into a jurisdiction as a witness, whether voluntarily or involuntarily, would be automatically immune from service of process. Such immunity, if applied without restraint, would, in the language of the above-cited decision, "paralyze the arm of the court and defeat the ends of justice in the very cause for the protection of which immunity is invoked".

This court has repeatedly held that where a determination of a lower court conflicts with a prior determination of this court certiorari will be granted. See, for example, *Forsyth* v. *Hammond*, 166 U. S. 506; *Pennsylvania Railroad Co.* v. *O'Rourke*, 344 U. S. 334; *Mitchell* v. *Budd*, 350 U. S. 473; *Cafeteria & Restaurant Workers Union, etc.* v. *McElroy*, 367 U. S. 886; *United Steel Workers of America* v. *N. L. R. B.*, 376 U. S. 492.

POINT II

Certiorari should be granted in the instant case because of a conflict between the determination of the Court of Appeals for the Second Circuit and the Court of Appeals for the Tenth Circuit.

The determination of the Court of Appeals for the Second Circuit, in the case at bar, is directly contrary to the determination of the Tenth Circuit Court of Appeals in *Calada* v. *Walker*, 10 Cir. 309 Fed. (2nd) 74. In that case a corporation plaintiff was seeking to enforce a judgment against one Walker. The Secretary-Treasurer of the plaintiff, one Christensen, was served with process in the case when he was in the district attending as a witness an action seeking to enforce the judgment against Walker. A motion by Christensen to vacate the service of process was denied, the court, on page 76, holding as follows:

> "• • • The two cases are therefore so closely related as to justify the withholding of the claimed immunity. Certainly it cannot be said that this is the case where judicial administration requires that immunity be granted • • • "

The facts in the *Calada* case are actually weaker than the facts in the case at bar. In *Calada* the person served was a citizen of the United States and presumably could be served at any time in the jurisdiction wherein he resided in this country. In the case at bar, however, there is no possibility of getting jurisdiction over Glass, who is concededly an alien and does not reside in this country.

Actually, in addition to failing to following *Calada*, the Court of Appeals also failed to follow other determinations of District Courts in the very jurisdiction wherein

the Court of Appeals sat. The cases involved, however, while cited by petitioner to the Court of Appeals, were not cited by the court in its opinion. Hence it must be assumed that the Court of Appeals did not specifically overrule these determinations. *Ferguson* v. *Ford Motor Co.*, 92 Fed. Supp. 868 (DCSDNY) involved almost the identical situation set forth in the case at bar wherein an attorney appeared in this jurisdiction to take a deposition in a cause pending here and was served with process while so attending. The same rule was enunciated in *Mofett* v. *Arabian-American Oil Co.*, 8 FRD 566, the *Mofett* case specifically holding as follows:

> "• • • The rule does not extend to process which is served in furtherance of the administration of justice in the very cause in connection with which the suitor or witness has come into the jurisdiction • • • "

Where conflict between circuits is involved this court has generally granted certiorari to resolve the conflict. See, for example, *Bruning* v. *U. S.*, 376 U. S. 358; *U. S.* v. *Carlo Bianchi & Co.*, 373 U. S. 709; *DiBella* v. *U. S.*, 369 U. S. 121; *NLRB* v. *New Syndicate Co.*, 365 U. S. 695; *Flora* v. *U. S.*, 357 U. S. 63; *Rogers* v. *Quan*, 357 U. S. 193; *NLRB* v. *Duval Jewelry Co.*, 357 U. S. 1; *Rainwater* v. *U. S.*, 356 U. S. 590; *U. S.* v. *F. & M. Schaefer Brewing Co.*, 356 U. S. 227; and *Haynes* v. *U. S.*, 353 U. S. 81.

It is therefore respectfully submitted that certiorari ought to be granted in this cause on the above grounds.

POINT III

Certiorari should be granted in this cause by reason of the important public interest in the problem set forth herein.

In addition to the grounds urged above, it is respectfully submitted that certiorari ought to be granted in this case by reason of the important public interest of the question presented here. The question involves the possible immunity of an alien from torts committed by the alien by commencing a Suit in the United States in the name of a financially irresponsible corporation. For example assume that an alien individual had committed a tort against a resident. If the alien has a claim against the resident all that the alien need do, if the determination of the Court of Appeals for the Second Circuit is sustained, is to form a financially irresponsible alien corporation, assign his claim to such financially irresponsible corporation, and have the financially irresponsible corporation commence litigation against the United States resident in the name of the corporation. The question presented in this case also involves the nature of the immunity granted to aliens, whether or not aliens are to be given greater rights than United States citizens in actions against U. S. citizens and related matters.

The questions involved, in view of the steadily increasing volume of International dealings, involve questions of great public importance. Under these circumstances this Court ought to grant certiorari under the rationale of *U. S.* v. *Zacks*, 375 U. S. 59; *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U. S. 999; *Romero* v. *International Operating Co.*, 358 U. S. 354; *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249 and *U. S.* v. *Nugent*, 346 U. S. 1.

POINT IV

Certiorari ought to be granted herein since the determination of the Court of Appeals constitutes a violation of the Fifth Amendment to the Constitution of the United States.

In addition to the reasons set forth hereinabove for granting certiorari in this case there also is involved a substantial Constitutional question involving violation of the Fifth Amendment to the Constitution of the United States. This point was raised before the Court of Appeals of the Second Circuit but ignored in the Opinion.

As was held by this court in *Galvan* v. *Press*, 347 U. S. 522, fair play is the essence of "due process". This court also held in *McNabb* v. *U. S.*, 318 U. S. 332; *Ackerman* v. *U. S.*, 179 Fed. (2nd) 236, affirmed 340 U. S. 193, that "due process" requires that a litigant have the right to present his claim including any defenses that he may have. If the determination of the Court of Appeals for the Second Circuit is allowed to stand unreviewed in this case it is respectfully submitted that a direct violation of the Fifth Amendment of the United States has been committed.

The plaintiff in this case is being sued by a financially irresponsible corporation for a substantial sum of money. The plaintiff has, of course, in the pending action, interposed certain defenses. These defenses may or may not be sustained. If the defenses are sustained and the affirmative relief asked for by the plaintiff is granted in the pending action the plaintiff in this action has no redress because the corporate plaintiff in the pending action is financially irresponsible. On the other hand the plaintiff in this action is subject to a Judgment, if its defenses are not sustained in the pending action, for a substantial sum. To

permit an alien to so misuse the processes of our court to obtain such an unjustifiable result would, of course, be a direct denial of "fair play" and thus a violation of "due process".

The grant of immunity from service of process to a purported "witness" coming into a jurisdiction is a court-made rule. Such a court-made rule must fall, of course, if its application results in direct violation of an amendment to the Constitution of the United States.

In view of the direct Constitutional issue involved in this action it is respectfully submitted that certiorari ought to be granted.

POINT V

Certiorari ought also to be granted by reason of the denial of due process to the petitioner in failing to hold a hearing on the question as to whether or not the defendant was engaged in personal business while in New York City and therefore lost his immunity.

In addition to the questions presented above the record before the court indicated a conflict in the affidavits submitted as to whether or not the defendant was engaged in personal business while in New York at the time that his deposition was taken in the pending action. The petitioner requested the District Court to hold a hearing on the question involved wherein testimony might be taken in view of the conflict between the affidavits. The District Court did not hold such hearing. Failure to hold a hearing on a disputed issue of fact is, of course, a violation of due process where the determination of the fact involved has an important bearing upon the determination of the court. It is conceded, of course, that had Glass been involved in per-

sonal business while in New York City at the time that his deposition was taken his immunity from service of process would have been denied under well recognized rules of law. Thus the failure of the courts to hold a hearing on the crucial issue of fact would, even without more, constitute a direct denial of due process of law and would make the determination of the Court of Appeals reversible. In view of the Constitutional issues involved this court should, of course, grant certiorari upon that ground alone.

POINT VI

This Court should grant certiorari in the case at bar in order to determine whether or not *Erie* v. *Tompkins* applies to the instant case or whether a Federal Rule should be applied.

If, in the case at bar, the well known case of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, is applicable then the Court of Appeals erred in failing to follow a New York State decision directly contrary to the position taken by the court in this case. The New York case involved is *Koral* v. *Savory Inc.*, 254 App. Div. 692, 4 N. Y. S. (2) 576. In that case service of process was sustained upon a defendant who was an officer of a non-resident corporation defendant who was sued in the plaintiff's State of residence. When the officer appeared for the purpose of giving his deposition the plaintiff served process upon him and such service was sustained. Actually, the situation in the case at bar is stronger than that in *Koral* because, in this case, the corporation involved is a corporate *plaintiff* who has voluntarily brought an action in this jurisdiction rather than a corporate *defendant* who has merely been sued in this jurisdiction. In any

event *Koral* represents the law in the State of New York which is directly contrary to the position taken by the Court of Appeals in the instant case. Hence, if *Erie* v. *Tompkins* is the law then the Court of Appeals determination is clearly erroneous. On the other hand if the Court is permitted to apply Federal law then certiorari should be granted, in any event, to resolve this question.

CONCLUSION

Certiorari in the case at bar should be granted herein, this case reviewed by this Court, and a determination made based upon the record.

Respectfully submitted,

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Petitioner,
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New York, New York.

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Complaint

UNITED STATES DISTRICT COURT

Southern District of New York

Shapiro & Son Curtain Corp.,

Plaintiff,

against

Basil Glass,

Defendant.

Plaintiff, for tis complaint herein, respectfully shows to this Court and alleges:

First: Plaintiff is a corporation duly organized and existing under the laws of the State of New York having its office and place of business at 222 Fifth Avenue, New York, New York.

Second: On information and belief the defendant is a citizen and resident of the United Kingdom having no assistance whatsoever in the United States. Plaintiff is subject to the jurisdiction of this Court by reason of his presence in the United States of America and the service of personal process upon him.

THIRD: Defendant dominates and controls a corporation known as Everwear Candlewick Limited, which corporation is subject to the jurisdiction of this Court since it has commenced an action herein against the defendant which is now pending under 64 Civil 1970. Defendant is further subject to the jurisdiction of this Court since said Everwear Candlewick Limited is merely the "alter ego" of the said Everwear Candlewick Limited.

FOURTH: This Court acquires jurisdiction of this cause of action by virtue of the diversity of citizenship of the parties hereto.

FIFTH: The amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand ($10,000.00) Dollars.

SIXTH: This cause of action sets forth, in part, a claim which may be cognizable only after another claim has been prosecuted to a conclusion. Pursuant to Rule 18(b) of the Federal Rules of Civil Procedure the said claim may be interposed in this action in accordance with the provisions of Rule 18(b).

SEVENTH: On information and belief the said defendant, Basil Glass, conspiring with Everwear Candlewick Limited, Julius Glass, and others not presently known to the plaintiff, embarked upon a combination and conspiracy in an attempt to interfere with the business of the defendant.

EIGHTH: In support of said conspiracy the defendant, and said co-conspirators, on information and belief, performed the following acts:

a) Firms with whom the defendant had no commercial or other relationships, but were customers or suppliers of the plaintiff, were approached by agents of the defend-

ant and were told that the plaintiff corporation engaged in sharp and dishonest business practices, did not live up to their contracts, and was otherwise disreputable and dishonest.

b) Employees of the plaintiff corporation were approached by representatives of the plaintiff, were informed that the plaintiff corporation was disreputable and did not carry out its agreement.

c) Employees of the plaintiff corporation were approached by representatives of the defendant and confidential business information was attempted to be extracted from said employees.

d) Confidential business information was attempted to be extracted from suppliers and other persons with whom the plaintiff had business relations.

e) An Australian corporation, who has had business relationships with a supplier of the plaintiff, was approached by agents of the defendant and was threatened with suit, in an attempt to cause said firm to cancel its agreements with said supplier in the hope that said cancellation would cause annoyance, embarrassment and oppression to the plaintiff.

f) Defendant had its "alter ego" Everwear Candlewick Limited, a corporation having no assets in the United States and being financially irresponsible, commence an action against the plaintiff in this Court, which action is presently undetermined under Civil Action 64 Civil 1970.

g) In the complaint in Civil Action 64 Civil 1790 the defendant inserted false allegations alleging that the matter in controversy herein exceeded the sum of Ten Thousand ($10,000.00) Dollars and that the defendant had breached an agreement with the plaintiff. These allegations were inserted into said complaint under the behest and direc-

tion of said Basil Glass, said Basil Glass well knowing that said allegations were false, untrue, having no probable cause, and without basis in law and fact.

h) In the aforesaid action, 64 Civil 1970, which action was commenced under the direction and the behest of said Basil Glass, an alleged agreement was annexed to said complaint which agreement did not corespond to the agreement executed between the parties. In fact, the aforesaid agreement was materially altered subsequent to its execution by the parties and that fact was well known to the defendant prior to the commencement of 64 Civil 1920.

(i) On information and belief the plaintiff in 64 Civil 1970, Everwear Candlewick Limited is a financially irresponsible company but that the defendant has considerable personal funds. In order to avoid the personal judgment which would be asserted against said defendant after termination of 64 Civil 1970, said defendant deliberately brought said suit in the same name of said irresponsible corporation.

(j) On information and belief the benefits of the aforesaid agreement which were not to be assignable, were deliberately assigned from Everwear Candlewick Limited to Vantona Textile Corporation at the behest and connivance of said defendant so as to attempt to interfere with the business of the plaintiff and destroy the plaintiff's business.

NINTH: As a result of the said unlawful activities on the part of the defendant, as set forth hereinabove, the plaintiff has been severely damaged by reason of, but not limited to, the following:

(a) On information and belief the commencement of the said lawsuit 64 Civil 1970 has been advertised in commer-

cial reports and that, by reason thereof, the commercial standing of the plaintiff has become impaired and its credit position has been weakened.

(b) The interference made by the defendant, with suppliers and employees of the plaintiff has caused dislocation of the plaintiff's business and interference with its relationships with its suppliers.

(c) The commencement of the said action 64 Civil 1970 has caused the plaintiff to expend, and will cause the plaintiff to expend in the future, substantial sums for attorneys' fees required to defend against the instant unlawful action.

TENTH: On information and belief, prior to the commencement of the instant action, the defendant well knew that the agreement sued upon in 64 Civil 1970 was void as violative of the anti-trust laws of the United States and the public policy of the United States of America and the State of New York.

ELEVENTH: In order to avoid the civil and criminal liability which would be imposed against said defendant by reason of his personal participation in the making of an agreement well known by him to be violative of the anti-trust laws of the United States and his deliberate attempt to destroy the business of the plaintiff in violation of the anti-trust laws of the United States, the said defendant deliberately commenced the lawsuit in 64 Civil 1970 in the name of said financially irresponsible corporation, Everwear Candlewick Limited.

TWELFTH: As a result of the unlawful activities of the defendant, as set forth herein, the defendant has been seriously damaged.

THIRTEENTH: Plaintiff demands a trial by jury of all issues involved in this action.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $100,000.00 trebled to $300,000.00 together with an attorney's fee of $25,000.00 and the cost and disbursements of this action.

Dated: January 23, 1965

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Decision of the Court of Appeals for the Second Circuit

LEVET, *District Judge*:

The defendant Glass is a director of Everwear Candlewick, Ltd. ("Everwear"), an English corporation, which is the plaintiff in an action in this court against Shapiro & Son Curtain Corp. ("Shapiro"), 64 Civ. 1970. Defendant Glass is a citizen of Britain, residing and domiciled in London, England. He came into this courthouse pursuant to court order for the purpose of being examined before trial in this first action, 64 Civ. 1970. While he was being examined by the attorneys for Shapiro he was served with a summons and complaint in a suit by Shapiro.

In a motion made before Judge Metzner of the Southern District of New York, the defendant Glass moved to vacate the service of the summons and complaint on the ground that he was immune from service of process at

the time he was served. A motion to quash the service was granted and the complaint dismissed.

The complaint in the first action alleges that Everwear and Shapiro entered into a certain written agreement and that Shapiro has breached the agreement in certain respects. Everwear demands that the defendant assign to plaintiff certain patents and that Shapiro account to Everwear for benefits and sums received by it and to pay damages. Shapiro alleged in a counterclaim against Everwear that Everwear was involved in a combination and conspiracy to interfere with its business.

In the present action of Shapiro against Glass, 65 Civ. 202, the complaint asserts that the defendant Glass dominates and controls Everwear. The complaint further alleges that this cause of action is a claim cognizable "only after another claim has been prosecuted to a conclusion," presumably referring to the action by Everwear. The complaint goes on to state that the defendant Glass conspired with Everwear, Julius Glass and others to interfere with the business of the defendant.

Generally, witnesses, parties and attorneys coming from another jurisdiction are exempt from service of civil process during the period required for their attendance in Court. *Stewart* v. *Ramsay*, 242 U. S. 128 (1916); *New England Industries, Inc.* v. *Margiotti*, 270 App. Div. 488 (1st Dept.), aff'd, 296 N. Y. 722 (1946).

In *Lamb* v. *Schmitt*, 285 U. S. 222 (1932), it was pointed out that this rule is founded on the convenience of the court, and "should be extended or withheld only as judicial necessities require." *Id.* at 225. "The test is whether the immunity itself, if allowed, would so obstruct judicial administration in the very cause for the protection of which it is invoked as to justify withholding it. That, as we have

said, depends here upon the nature of the proceeding in which the service is made and its relation to the principal suit, both of which are disclosed by the pleadings." *Id.* at 228.

In *Lamb* v. *Schmitt, supra*, immunity was denied to a non-resident attorney served while acting as a lawyer in a suit to set aside the disposition of property as in fraud of judgment creditors. The service was by a receiver appointed in the main suit and the purpose of the new suit was to recover funds involved in the main suit which had been paid to the attorney ostensibly as fees.

The Supreme Court said: "The deterrent effect, if any, upon attendance at the trial, of the possibility that these procedures may be resorted to, is outweighed by the fact that the immunity, if allowed, might paralyze the arm of the court and defeat the ends of justice in the very cause for the protection of which the immunity is invoked." *Id.* at 226.

Here we have no such case. The counterclaim in the first action may be related to the complaint in the second action, but there is no showing that immunity, if allowed here, would so obstruct judicial administration in the very cause for the protection of which it is invoked as to justify withholding it. Certainly, the mere presence of the relationship is insufficient to dispel the immunity. *Page Co.* v. *MacDonald,* 261 U. S. 446 (1922); *United Nations* v. *Adler,* 90 F. Supp. 440 (S. D. N. Y. 1950).

The fact that Glass's appearance was pursuant to court order does not affect the immunity. *In re Equitable Company,* 277 F. 2d 319 (2nd Cir. 1960). Further, although it is claimed that he dominates and controls Everwear (the plaintiff in the first action), Glass does not lose his immunity on that account. Contrary to appellant's conten-

tion, immunity from service is not denied to plaintiffs. *Page Co.* v. *MacDonald, supra.*

Judge Metzner found that Glass's activities here did not amount to conducting business and hence did not defeat the immunity. The evidence supports his conclusion.

On balance, the inconvenience to Shapiro is far outweighed by the court's interest in securing the participation of non-residents in civil proceedings. *International Plastics Harmonica Corp.* v. *Harmonica Reed Corp.*, 69 F. Supp. 515 (E. D. Pa. 1946).

Affirmed.